No. 17-988

In the Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,

Petitioners,

v.

FRANK VARELA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS[1]

Varela focuses little attention on the question presented: whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

No doubt recognizing the weakness of his position on that issue, Varela's brief instead advances a litany of reasons why the Court should not decide the question—arguments that he asserted in unsuccessfully opposing certiorari. The Court should reject those arguments again.

First, Varela contends that the Ninth Circuit lacked appellate jurisdiction. The respondent in *Stolt-Nielsen* tried a similar tack to block this Court's consideration of the merits, and this Court found no "clear justification for now embracing an argument '[the Court] necessarily considered and rejected' in granting certiorari.'" 559 U.S. 662, 670 n.2 (2010).

And Varela's argument is plainly wrong. By both requiring class arbitration and dismissing Varela's claims in favor of arbitration, the district court's order constitutes a "'final decision with respect to an arbitration'" subject to "immediate appeal" under Section 16(a)(3) of the FAA. This Court held just that in *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 86-87 (2000). But even if the district court's order were not a dismissal, it effectively denied Lamps Plus's motion to compel *individual* arbitration—instead agreeing with *Varela*'s contention, over

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[1] The Rule 29.6 Statement in the opening brief remains accurate.

Lamps Plus's strenuous objection, that the agreement authorized class-wide arbitration. It therefore was appealable under 9 U.S.C. § 16(a)(1)(B).

Second, Varela maintains that whether the parties authorized class arbitration is a "state-law question of contract construction." Resp. Br. 36. But *Stolt-Nielsen* holds that "[w]hile the interpretation of an arbitration agreement is *generally* a matter of state law, the *FAA* imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" 559 U.S. at 681 (emphasis added). That is a federal law standard.

Third, "the FAA requires" that the agreement must show that the parties affirmatively "*agreed to authorize*" class arbitration. *Id.* at 687 (emphasis in original).

Here, the agreement says nothing about class arbitration and contains language making clear that the only claims that may be asserted are the parties' own claims. The Ninth Circuit's contrary conclusion and Varela's arguments rest entirely on language that is standard in numerous arbitration agreements and would turn *Stolt-Nielsen* on its head by making class arbitration the norm whenever an agreement fails to disavow it.

The Court should reverse the decision below.

ARGUMENT

I. Varela's Renewed Jurisdictional Argument Is Meritless.

Varela renews his contention—not raised below but rather asserted for the first time at the petition stage—that the Ninth Circuit lacked appellate juris-

diction. Resp. Br. 9-16; compare Br. in Opp. 20-24. That argument is wrong.

The respondent in *Stolt-Nielsen* advanced a similar argument, asserting for the first time at the petition stage, and again at the merits stage, that the lower federal courts lacked jurisdiction to review the arbitral panel's clause construction award because the case was not yet ripe for review. See *Stolt-Nielsen* Br. in Opp., 2009 WL 1339235, at *23-29 (May 11, 2009); *Stolt-Nielsen* Resp. Br., 2009 WL 3404244, at *52-59 (Oct. 20, 2009).

The Court rejected that argument, "disagree[ing]" with the jurisdictional argument on the merits and observing that there was no "clear justification for now embracing an argument '[the Court] necessarily considered and rejected' in granting certiorari.'" 559 U.S. at 670 n.2 (quoting *United States* v. *Williams*, 504 U.S. 36, 40 (1992)).

The same outcome is warranted here. The district court's single order terminating this case had two components: (1) it compelled a *class-wide* arbitration over Lamps Plus's objections, notwithstanding Lamps Plus's repeated requests for an order compelling individual arbitration; and (2) it dismissed all of Varela's claims in favor of that class arbitration. Pet. App. 20a-22a, 23a.

Varela's effort to manufacture a jurisdictional barrier depends completely on a sleight-of-hand: separating the two components of this single order and treating them as if they were entirely unrelated. Specifically, he appears to concede that the dismissal is final, but he argues that the dismissal is not adverse to Lamps Plus. Resp. Br. 12-16. Then, he appears to recognize that the order compelling class ar-

bitration is adverse to Lamps Plus, but he argues that it is a non-final order "directing arbitration to proceed." *Id.* at 10 (quoting 9 U.S.C. § 16(b)(2)).

When the two elements of the district court's order are considered together—as this Court did in *Randolph*—Varela's argument fails.

1. The statutory text, and this Court's application of that provision in *Randolph*, confirm that the district court's dismissal renders the *entire* order a "'final decision with respect to an arbitration'" that is immediately appealable. 531 U.S. at 85 (quoting 9 U.S.C. § 16(a)(3)). The dismissal is a decision made "with respect to an arbitration" (9 U.S.C. § 16(a)(3))—that is, the portion of the order dismissing the claims is inextricably tied to the portion of the order compelling arbitration.

Randolph, which used the singular terms "order" and "decision," confirms that link: "The District Court's order directed that arbitration proceed and dismissed respondent's claims for relief. The question before us, then is whether *that order* can be appealed as 'a final decision with respect to an arbitration.'" 531 U.S. at 85 (emphasis added). And "where, as here, the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, *that decision* is final within the meaning of § 16(a)(3), and therefore appealable." *Id.* at 89 (emphasis added).[2]

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[2] Varela notes that the dismissal here was without prejudice, but recognizes (Resp. Br. 13 n.2) that every court of appeals to consider the issue has held that a dismissal without prejudice in favor of arbitration is a final, appealable order under *Randolph*. See Pet. Br. 30 & n.7. Rather than challenge those decisions, he principally contends that "[e]ven assuming the dismis-

Varela argues that an appeal is not available because the district court's dismissal of his claims was "favorable" to Lamps Plus (*e.g.*, Resp. Br. 14-16)—in other words, he claims that Lamps Plus lacks standing to appeal. But the order did not just dismiss the action, it also compelled a class-wide arbitration that Lamps Plus never requested and actively argued *against*. Pet. Br. 30; ER48-51, 159-161. That plainly harmed Lamps Plus.

Varela points to *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017), but that case is readily distinguishable. This Court held in *Baker* that a plaintiff cannot *himself* voluntarily dismiss his claims following an adverse class certification decision in order to circumvent Rule 23(f)'s "careful calibration" for interlocutory review of such orders. *Id.* at 1714. And *Keena* v. *Groupon, Inc.*, 886 F.3d 360, 363-65 (4th Cir. 2018) (cited at Resp. Br. 15) followed *Baker* in rejecting a plaintiff's attempted manufacture of appellate jurisdiction over an order granting an unappealable *stay* in favor of arbitration (9 U.S.C. § 16(b)(1)) by voluntarily dismissing her own claims.

Here, by contrast, the district court's dismissal does not represent a party's end-run around the requirements for interlocutory appeals, but rather fits *within* the category of orders—"a final decision with respect to an arbitration"—for which Congress expressly "preserve[d] [an] immediate appeal." *Randolph*, 531 U.S. at 86.

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sal is nominally final," it was "a favorable decision" for Lamps Plus (Resp. Br. 13-15). As discussed below, that contention cannot be squared with the fact that Lamps Plus *resisted* class-wide arbitration.

Finally, Varela and an *amicus* suggest that the district court may have lacked authority under the FAA to enter a dismissal rather than a stay. Resp. Br. 16; AAJ Br. 3-14. But they concede that the circumstances here are no different than in *Randolph*, where "[t]he question whether the District Court should have taken that course [was] not before" this Court (531 U.S. at 87 n.2) "because no party has sought to overturn the dismissal order on appeal." Resp. Br. 16; see AAJ Br. 10 & n.6. The *amicus*'s further suggestion that the Court in *Randolph* did not consider the jurisdictional consequences of the district court's authority to enter a dismissal (AAJ Br. 10 n.6) is belied by the Court's express recognition that "[h]ad the district court entered a stay rather than a dismissal in this case, that order would not have been appealable." *Randolph*, 531 U.S. at 87 n.2. In other words, this Court, fully aware of the consequences for appellate jurisdiction that follow from the distinction between a dismissal and a stay, held that a dismissal is a final appealable order. The same approach is warranted here.

2. The court of appeals' jurisdiction also rests on a second, independent ground. The district court's order effectively denied Lamps Plus's motion, thereby authorizing an appeal under Section 16(a)(1)(B) of the FAA, which provides for appeals of an order "denying a petition under section 4 of this title to order arbitration to proceed."

Lamps Plus asked for "an order directing that * * * arbitration proceed *in the manner provided for in such agreement*"—and expressly contended in its arbitration motion that the "manner provided for" was "arbitration on an individual basis." 9 U.S.C. § 4 (emphasis added); ER 144, 159-161.

Varela opposed that motion, contending instead that "the arbitration provision is broad enough to encompass class actions in arbitration" and urged the court to resolve "any ambiguities" against Lamps Plus. ER124. The district court rejected the relief sought in Lamps Plus's motion, instead accepting Varela's "conten[tion] that, if his individual claims are subject to arbitration, so are the class claims." Pet. App. 21a. The Ninth Circuit similarly noted that the district court "accept[ed] the construction posited by Varela—that the ambiguous Agreement permits class arbitration." Pet. App. 4a-5a.

Under these circumstances, Varela's contentions that the district court "provided precisely the relief that Lamps Plus sought" and that Lamps Plus had received a "favorable decision" (Resp. Br. 13, 14) is simply false. Instead, the district court's order, both in substance and effect, refused to grant the relief that Lamps Plus sought—an order compelling *individual* arbitration.

Varela asserts that reaching the merits here will "create a gigantic loophole in section 16(b)(2)" and result in a flood of appeals "over the proper forum and location, the proper arbitrator, and the proper arbitration procedures." Resp. Br. 10, 12. But an order compelling class arbitration over a party's objection is fundamentally different from an order resolving disputes over the location of the arbitration and other minor procedural issues. This Court has explained that, because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental," imposing class-wide arbitration is different in kind from a determination of "merely what 'procedural mode' is available to present [a party's] claims." *Stolt-Nielsen*, 559 U.S. at

687. Rather, it transforms the arbitration into a proceeding that "is not arbitration as envisioned by the FAA" and "lacks its benefits." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 351 (2011); Pet. Br. 10-13. Under the FAA, "one of arbitration's *fundamental* attributes" is its "individualized nature." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1623 (2018).

More generally, this Court has recognized that class procedures are transformative and impose "the risk of 'in terrorem' settlements." *Concepcion*, 563 U.S. at 350; see also *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (Ginsburg, J., dissenting).

That settlement pressure is multiplied exponentially in the arbitration context because of the extremely limited grounds for challenging an arbitral award. See *Concepcion*, 563 U.S. at 351. Requiring a defendant to litigate a class arbitration before it is able to challenge a district court's decision to order class arbitration will as a practical reality insulate that decision from review.

The cases Varela cites (Resp. Br. 11-12) only reinforce this distinction. None of them involved an order imposing class arbitration on a defendant over its objection; most involved different locations or forums for an individual arbitration. See Pet. Reply 5 n.4 (discussing cases). Lamps Plus was entitled to appeal the district court's adverse order imposing a class arbitration that Lamps Plus never sought and actively opposed.

II. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

A. Determining Whether An Arbitration Agreement Authorizes Class Arbitration Requires Application Of Both Federal Law And State Law Standards.

Varela also seeks to avoid the question presented by asserting that the decision below rests entirely on state law and that there is no federal-law question for this Court to address—another argument advanced in his brief in opposition (at 7-11). See Resp. Br. 17-37. In essence, his argument is: (1) so long as a court frames its decision as an application of state contract interpretation principles—rather than its own policy views—that interpretation gives each party all that "it was entitled to under the FAA" (Resp. Br. 35); and (2) if the court misconstrues the agreement, that "add[s] up only to a claim of error on the state-law side of the equation" (*id.* at 36) and therefore does not present a federal question. That argument is wrong: The FAA imposes significant constraints on the application of state law.

1. The Court has recognized in a variety of contexts that, although state law generally governs the interpretation of an arbitration agreement, the FAA imposes interpretive rules that constrain state law.

For example, the FAA imposes a rule that parties must clearly and unmistakably agree to depart from the presumption that gateway questions of arbitrability are for a court to decide, to avoid "forc[ing] unwilling parties to arbitrate a matter" contrary to their expectations. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 945 (1995). Moreover, the "liberal federal policy favoring arbitration

agreements" means that the "[FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitral issues should be construed in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

For similar reasons, the FAA supplements state contract law by requiring an affirmative agreement to class arbitration to ensure that the parties intended "the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration." *Stolt-Nielsen*, 559 U.S. at 686. Because "the relative benefits of class-action arbitration are much less assured," there is "reason to doubt the parties' mutual consent to" abandon individualized arbitration and instead "resolve disputes through class-wide arbitration." *Id.* at 685-86 (citing *First Options*, 514 U.S. at 945).

Like the holdings in *First Options* and *Moses H. Cone*, *Stolt-Nielsen*'s holding that the "FAA requires more"—a "contractual basis" for concluding that the parties agreed to authorize class arbitration (*id.* at 687)—is a statement of substantive federal law. Indeed, the Court made that clear by stating it was specifying "the rule to be applied in deciding whether class arbitration is permitted." *Id.* at 680-81. Whether the agreement satisfies that affirmative federal requirement does not turn solely on state law: federal law requires that the agreement affirmatively manifest the parties' consent to class arbitration.

Varela's approach would allow the FAA's "rules of fundamental importance" (*id.* at 682) to be satisfied by formalistic recitals. Varela would declare con-

clusive a court's labeling of its decision as an "interpretation of the contract"; in his view, the FAA would have no further role to play. Resp. Br. 35-36.

But "merely saying something is so does not make it so." *Stolt-Nielsen*, 559 U.S. at 675 n.7. And Varela's approach would make it "trivially easy" for courts "to undermine the Act." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1428 (2017). If Varela were correct, all a court would need to do to immunize its reading from the FAA's preemptive force—no matter how untenable that reading—is invoke state-law rules governing contract interpretation.

Varela points to *Concepcion* to justify his approach—stating that the Court held "that the FAA required enforcement of agreements prohibiting class arbitration as well as agreements allowing it" (Resp. Br. 23). In his view, that means the FAA is agnostic as to the difference between individual and classwide arbitration. But this Court has repeatedly held otherwise, explaining that class arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 563 U.S. at 351; see also *Epic Sys.*, 138 S. Ct. at 1623 ("*Concepcion*'s essential insight" is that courts may not "reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent").

Varela's reliance on *Oxford Health* is equally misplaced. He concedes that the Court's decision rested on the "limits [on] judicial review" of an *arbitrator*'s decision (see 9 U.S.C. § 10(a)) and that those limits are "not present in this case." Resp. Br. 24. His assertion that the decision is "highly instructive as to

the limits of the FAA's commands concerning class arbitration" (*ibid.*) therefore makes no sense.

Indeed, this Court rejected Oxford Health's argument that the parties' arbitration clause "lack[ed] any of the terms or features that would indicate an agreement to use class procedures * * * because, *and only because*, it is not properly addressed to a court" under Section 10(a)(4). 569 U.S. at 572 (emphasis added). Justice Alito's concurrence similarly observed that "[i]f we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration * * * from the fact of the parties' agreement to arbitrate.'" *Id.* at 574 (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685).

In short, *Oxford Health*'s *arbitrator*-specific holding does not apply to a *court's* interpretation of an arbitration agreement. Instead, this Court reviews *de novo* the federal question whether the Ninth Circuit's interpretation is consistent with the FAA's requirement of an affirmative indication in the arbitration agreement of the parties' consent to class arbitration.

2. Varela also has no answer to *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015), in which this Court squarely rejected the lower court's protestations of neutrality in interpreting the phrase "law of your state" in a consumer contract. This Court explained that although "California courts are the ultimate authority on [California] law," it was for this Court to decide whether "that state law is consistent with the [FAA]." *Id.* at 468.

So too here. Varela acknowledges *Imburgia*'s holding that "a purported application of even neutral state-law contract principles to an arbitration agreement" must still comport with the FAA. Resp. Br. 37. He nonetheless contends that *Imburgia*'s reach is limited to an interpretation that is "so lacking in justification that it does not truly reflect generally applicable contract law." *Ibid.* But that supposed limitation offers no help to Varela because it aptly describes the decision below rather than distinguishing it. See Pet. Br. 10-27; pages 13-21, *infra*. The panel majority crafted a "unique" interpretation of the Agreement fashioned to impose class arbitration rather than the default—bilateral arbitration. *Imburgia*, 136 S. Ct. at 469.

B. The Ninth Circuit's Inference Of An Agreement To Authorize Class Arbitration Lacks Any Contractual Basis.

When Varela finally turns to the merits, he largely repeats the errors made by the Ninth Circuit panel majority. There is not a word in the Agreement that demonstrates an intention to authorize class-wide arbitration. Varela also has no persuasive response to the language throughout the agreement affirmatively demonstrating that the parties contemplated bilateral arbitration instead.

Accordingly, the decision below flunks the FAA's "contractual basis" requirement articulated by *Stolt-Nielsen*. And it certainly does not satisfy the "clear and unmistakable" standard that, as we discuss, should govern the inquiry here.

1. Varela has no persuasive response to the Agreement's text clearly contemplating bilateral arbitration.

To begin with, Varela has no meaningful answer to the multiple portions of the Agreement's text demonstrating the parties' intent to engage in traditional, bilateral arbitration.

For example, Varela does not deny that the Agreement limits the claims subject to arbitration to "claims or controversies" that "*I* may have against the Company * * * or that the Company * * * may have against *me*" "aris[ing] in connection with *my* employment, or any of the parties' rights and obligations arising under *this Agreement*." Pet. App. 24a-25a (emphasis added).

He maintains, with no support, that this language "does not exclude the possibility that the arbitration may encompass claims that [Varela] could assert on an aggregate basis together with those that are exclusively and individually his." Resp. Br. 44. But that assertion makes no sense, because the class device cannot transform the claims of *other* employees regarding *their* employment into *Varela*'s claims regarding *his* employment. See Opening Br. 17. And Varela elides the Agreement's terms "claims or controversies" with the wholly different term "lawsuit" in asserting that "when a plaintiff files a civil action against his employer in court, it is undoubtedly a lawsuit 'he' brought against 'the company.'" Resp. Br. 44. Varela enters Alice in Wonderland territory in analyzing the Agreement's language providing that "any and all disputes, claims or controversies arising out of or relating to this Agreement [or] the employment relationship between the parties" will be subject to arbitration (Pet. App. 24a). Varela asserts

that this language contains "no limitation to claims of the singular employee signing the agreement" (Resp. Br. 45), but that reading is not plausible. "Parties" in that context plainly refers to the two parties to the Agreement—Lamps Plus and Varela—and states nothing more than their mutual obligation to arbitrate claims that one might have against the other, not to arbitrate claims of other employees. Moreover, the Agreement separately contains a straightforward "singular limitation" in the language calling for the employee to arbitrate claims or controversies "that *I* may have against the Company." Pet. App. 24a (emphasis added).

Finally, Varela's only response to the Agreement's repeated use of "either party"—a term suggesting bilateral arbitration—is to protest that absent class members are not named parties. Resp. Br. 46. But if Varela's argument were correct, that would lead to the absurd result that the parties did not intend to permit "traditional joinder" of the claims of a few employees into a single proceeding, but did intend to permit class actions, which are a "species" of joinder. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010).

2. The contract provisions relied upon by the Ninth Circuit do not reflect consent to class arbitration.

Varela relies heavily on language providing that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to *my* employment." Pet. App. 24a (emphasis added). But that phrase merely states that the employee agrees to arbitrate in place of going to court, which is one of "the primary characteristic[s] of an arbitration agreement"—namely, "a waiver of the right to go to court

and to receive a jury trial." *Kindred*, 137 S. Ct. at 1427. The language does not state and does not mean that the arbitration will duplicate the procedures available in court.

Moreover, language stating the obvious proposition that arbitration is a substitute for court proceedings—commonly included in arbitration agreements to ensure that the parties are aware that they are giving up the right to proceed in court—cannot support an inference that the parties agreed to jettison the "fundamental attributes of arbitration," including "*streamlined* proceedings." *Concepcion*, 563 U.S. at 344 (emphasis added).

The Agreement's language calling for arbitration of "all disputes, claims or controversies" related to the parties' employment relationship describes the substantive coverage of the arbitration agreement. Varela does not dispute that a class action is a procedural device, not a substantive dispute or claim. Resp. Br. 39-40. He instead tries to stretch this language—which appears routinely in arbitration clauses—to "include[] disputes and controversies that have classwide dimensions." *Id.* at 39.

But that interpretation is not plausible—particularly given the language, a few sentences later, specifying that the covered "claims" and "controversies" are those that "*I* may have against the Company * * * or that the Company may have against *me*." Pet. App. 24a (emphasis added). No one thinks, for example, that if two parties release all "claims, disputes, and controversies" they have against each other (*ibid.*), they have also released the claims of other persons.

Varela similarly errs in arguing that a court could infer consent to class arbitration from the Agreement's list of substantive disputes covered by arbitration, because some of those types of disputes, such as claims for discrimination, may be "pursued on behalf of a class" in court. Resp. Br. 40. Again, that language does not address what procedures are available in arbitration—it reflects nothing more than the parties' agreement "to submit their disputes to an arbitrator," which is *not* enough. *Stolt-Nielsen*, 559 U.S. at 685.

Moreover, Varela ignores that multiple California appellate courts confronted with similarly worded arbitration provisions have rejected the arguments he advances here. Opening Br. 19-20 (citing *Nelsen* v. *Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115 (2012); *Kinecta Alternative Fin. Solutions, Inc.* v. *Super. Ct.*, 205 Cal.App.4th 506, 511 n.1 (2012). For example, as the *Nelsen* court put it, "[a] class action by its very nature is not a dispute 'between [Nelsen] and Legacy Partners.' * * * [I]t would be a dispute between LPI and numerous individuals, one of whom is Nelsen." 207 Cal.App.4th at 1129-30.

Varela contends that *Nelsen* and *Kinecta* involved "different language" (Resp. Br. 48), but he is unable to identify any material differences.[3] Those decisions represent contrary "California case law" that "clarifies any doubt about how to interpret the language" (*Imburgia*, 136 S. Ct. at 469)—they are yet

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[3] Indeed, Varela conceded below that "the language in the *Kinecta* and *Nels[e]n* agreements are very similar to Lamps Plus's Agreement." Ninth Cir. Ans. Br. 44.

another indication that the panel majority's purported interpretation cannot stand.

Varela also gets no mileage out of the language authorizing the arbitrator to "award any remedy allowed by applicable law." Pet. App. 26a. Varela's reliance (Resp. Br. 40 n.8) on *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 n.7 (1995) is perplexing—that case stands for the common-sense proposition that language calling for arbitration of "'all disputes' and 'any remedy or relief'" means what it says, empowering the arbitrator to decide "any dispute that would otherwise be settled in a court" and to "award the same forms of damages or relief." But a class action is neither a "dispute" nor a "remedy" (unlike the request for punitive damages in *Mastrobuono*).

Varela concedes as much, but then argues that "class-wide remedies can only be awarded if the procedural device of a class action is available." Resp. Br. 40. That is circular bootstrapping—it assumes with no support in the Agreement that standard language permitting the arbitrator to award the same forms of relief that a court could award includes class-wide relief. And it proves far too much, because that language is found in virtually all arbitration agreements, as well as the arbitral rules of major providers.[4]

3. The additional provisions Varela relies upon do not authorize class arbitration.

Varela also cites two additional provisions in the Agreement not relied upon by either of the lower

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[4] See, *e.g.*, American Arbitration Association (AAA) Employment R. 39(d); JAMS Employment R. 24(c).

courts: (1) the agreement's incorporation of the employment arbitration rules of the AAA and JAMS; and (2) the provision giving the arbitrator "'exclusive authority to resolve any dispute relating to the interpretation, applicability, enforcement or formation of this Agreement.'" Resp. Br. 41-43 (quoting Pet. App. 30a).

These provisions do not help Varela.

First, Varela acknowledges that the AAA and JAMS employment arbitration rules incorporated into the agreement say nothing about class arbitration. Rather, he claims that those employment rules are supplemented by the existence of AAA's and JAMS's class arbitration rules.

But those supplemental class arbitration rules expressly provide that they shall *not* be read to provide a basis for inferring an agreement to classwide arbitration. Resp. Br. 42 n.10. Varela's argument that a court can interpret those rules to mean the exact opposite of what they forbid an arbitrator from doing—inferring an agreement to authorize classwide arbitration—is nonsensical.

Varela's reliance on the incorporation of standard arbitral rules also proves far too much. If choosing the rules of either of the two most popular arbitration providers constitutes consent to authorize class arbitration, then virtually every arbitration clause that does not explicitly foreclose class-wide arbitration would instead allow it—a result that would turn *Stolt-Nielsen* on its head and defy its admonition that class arbitration may not be "infer[red] solely from the fact of the parties' agreement to arbitrate." 559 U.S. at 685.

Second, the clause providing the arbitrator with exclusive authority to resolve disputes about the interpretation of the Agreement is a red herring. Neither party invoked that clause in the lower courts, and the parties agreed to have the courts determine whether the Agreement authorizes class arbitration (as well as to decide issues about the Agreement's scope and enforceability). See, *e.g.*, ER114, ER159-161. That clause also has no bearing on whether the Agreement authorizes class-wide arbitration—otherwise every arbitration agreement delegating these issues to the arbitrator could be held to authorize class arbitration unless it expressly states otherwise, a result that—again—is completely inconsistent with *Stolt-Nielsen*.

4. The state-law contra proferentem *doctrine cannot supply the requisite contractual basis for consent to class arbitration.*

Finally, Varela argues that the state-law *contra proferentem* doctrine is a rule of general applicability that allows courts to infer party agreement to class arbitration notwithstanding the FAA. Resp. Br. 30-35.

But for all of the reasons explained above and in our opening brief, the Agreement was not ambiguous—a pre-condition under state law for applying the *contra proferentem* doctrine. *Waller* v. *Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18-19 (1995) (ambiguity requires two or more "reasonable" constructions of a contract term, and courts may "not strain to create an ambiguity where none exists"). Nor is the Court required to accept the lower court's invocation of ambiguity: In *Imburgia*, this Court flatly rejected the state court's conclusion that the contract was ambiguous because the professed ambiguity required a de-

parture from the language's "ordinary meaning" and was "unique" to arbitration. 136 S. Ct. at 469.

And even if the arbitration agreement were "ambiguous" as to authorization of class arbitration—and even if the panel had invoked the *contra proferentem* doctrine in a neutral way—the panel's interpretation would have to give way to the FAA. That is because even a nominally neutral state-law doctrine cannot manufacture the consent to class arbitration that the "FAA requires" as a matter of federal law in order to displace the FAA's preference for bilateral arbitration. *Stolt-Nielsen*, 559 U.S. at 687; see also *Concepcion*, 563 U.S. at 348; Opening Br. 21-23.

In support of the *contra proferentem* argument, Varela relies on *Mastrobuono* (Resp. Br. 33-34), but never acknowledges—much less rebuts—our explanation that the Court was applying the strong federal policy *favoring* arbitration, and that the state-law canon provided *further* support for the arbitrability of the request for punitive damages at issue. Opening Br. 22. Indeed, Varela all but ignores the strong federal policy in favor of arbitration that this Court has repeatedly recognized in decisions spanning over three decades. *Ibid.* (citing *Moses H. Cone*, 460 U.S. at 24-25). He briefly suggests (Resp. Br. 31 n.7) that the pro-arbitration presumption prevails only when the agreement's scope is at issue, but the same rationale calls for applying the presumption in favor of compelling the type of arbitration "envisioned by the FAA," rather than using a state-law interpretive tie-breaker to impose a form of arbitration that—in the absence of party agreement—is inconsistent with the FAA. *Concepcion*, 563 U.S. at 351.

C. An Arbitration Agreement Should Not Be Construed To Authorize Class Procedures Unless The Text Clearly And Unmistakably Does So.

For all of the reasons above, the decision below amounts to a "palpable evasion of *Stolt-Nielsen*" and *Concepcion* (Pet. App. 5a), by inferring an agreement to class arbitration from a contract that contains no basis for such an inference. Reversal is therefore compelled by this Court's precedents.

Lamps Plus additionally has argued that "*[i]f the Court* * * * decides to address the question left open in *Stolt-Nielsen*"—how strong of a contractual basis is required for an agreement to authorize class arbitration—then the Court should hold that the FAA requires the same clear and unmistakable textual authorization that it requires in other contexts to depart from the FAA's default rules. Opening Br. 27-29 (emphasis added).

Varela protests that this Court cannot give further guidance on what the FAA requires, because this argument was not raised below or briefed at the petition stage. Resp. Br. 48-49. But this Court has provided guidance on an important question of federal law without it having been raised in the lower courts, explaining that it is "well-positioned to provide further guidance" on the contours of a statutory standard where "[t]he parties have had every opportunity to address the nature of the * * * standard" before this Court, even though it was not passed upon below. *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1927 n.4 (2017). The same is true here.

Moreover, identifying precisely how strong a contractual basis the FAA requires for an agreement to

authorize class arbitration is fairly encompassed in the question presented, which asks whether the FAA preempts a state-law interpretation that would authorize class arbitration based solely on general language commonly used in arbitration agreements. See *Daimler AG* v. *Bauman*, 571 U.S. 117, 136 n.16 (2014) (addressing an issue "fairly encompasse[d]" in the question presented, although it was raised solely by *amici* in the lower court); see also generally Stern & Gressman, Supreme Court Practice 458-60 (10th ed. 2013).

Varela's objections to the clear and unmistakable standard on the merits are unpersuasive.

First, Varela worries that a "clear and unmistakable" standard places too "heavy [a] thumb on the scales" in favor of bilateral arbitration. Resp. Br. 54. But the FAA emphatically does protect bilateral arbitration. See CWC Br. 17-22; Chamber Br. 3-13. And because "the relative benefits of class-action arbitration are much less assured," requiring a clear and unmistakable textual basis for consent to class arbitration is entirely consistent with *Stolt-Nielsen*'s admonition that courts or arbitrators should have "reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." 559 U.S. at 685-86. It also *furthers*, not displaces, the aim of ensuring that an agreement to class arbitration reflects "the parties' intentions" (Resp. Br. 50), and harmonizes it with the FAA's policy favoring individual arbitration. See RLC Br. 6-11.

Second, Varela misconstrues our position as asking this Court to decide whether the availability of class arbitration is a "gateway" issue of "arbitrability." Resp. Br. 52-53. In fact, that issue is not presented here, just as it was not presented in

Stolt-Nielsen or *Oxford Health*. Opening Br. 28 n.6. Rather, our point is simply that—just as this Court has required a clear and unmistakable expression of intent to depart from the default rule that courts decide issues of arbitrability—so too should it require clear and unmistakable agreement to depart from traditional, bilateral arbitration.

Third, Varela is wrong in contending the due process concerns identified in Justice Alito's concurrence in *Oxford Health* are absent here. Varela suggests that they arise only once an arbitrator actually certifies a class or issues a class-wide award. Resp. Br. 50-51. But the point is that the due process concerns created by class arbitration are yet another reason why the FAA favors bilateral arbitration, and why it is appropriate to require clear and unmistakable evidence of the parties' consent to abandon that default procedure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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